No. 84-5872 (1)

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROY E. DANIELS, PETITIONER,

v.

ANDREW WILLIAMS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 6, 1984
CERTIORARI GRANTED FEBRUARY 19, 1985

BEST AVAILABLE COPY

55 pp

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

DOCKET ENTRIES

ROY E. DANIELS, PLAINTIFF

v.

ANDREW WILLIAMS, RESPONDENT

1982		
Feb. 22	1	ORDERED that the complaint be filed IFP; deft file his response within 20 days; pltf. is granted 20 days after receipt of deft's response within which to file his rebuttal, ENT 02-22-82, RLW, filed. Copies mailed. lcq
Feb. 22	2	Complaint filed. lcq
Feb. 22	—	Consent forms mailed. lcq
Feb. 22	—	Summons issued. lcq
March 3	—	Marshal's return on executed summonses, filed. kfm
March 17	3	Deft's Answer, filed. kfm
March 17	—	Deft's *Consent* to Juris. of the Mag., filed. (Appeal to USDC) kfm
April 9	4	Deft's Motion for Summary Judgment, filed. lcq
April 19	5	ORDERED that pltf may, if he so desires, respond to def's motion for summary judgment within 20 days, entered 4/19/82 RLW, filed. Copies mailed. kfm
April 28	6	Pltf's Affidavit, filed. lcq
Aug. 2	7	MEMORANDUM of the Court, filed. kfm
Aug. 2	8	ORDER DISMISSING the complaint and enters judgment for the defts; pltf advised of his right to appeal, entered 8/2/82 RLW, filed. Copies mailed. kmf

Aug. 23	9	Pltf's Notice of Appeal, filed.	kmf
	10	Docket entries	
	11	Clerk's certificate	

Supreme Court of the United States

No. 84-5872

ROY E. DANIELS, PETITIONER,

v.

ANDREW WILLIAMS

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

FEBRUARY 19, 1985

Justice Powell took no part in the consideration or decision of this petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

ORDER

Upon consideration of the plaintiff's application to proceed *in forma pauperis*, his proof of poverty, and the complaint annexed, the court ORDERS that:

(1) the complaint be filed *in forma pauperis;*

(2) the defendant file his response pleading within 20 days of the receipt of this order;

(3) the plaintiff is reminded of Rule 5 of the Federal Rules of Civil Procedure, which requires that every pleading or other notice after the complaint be served on all parties by mailing it to each party's attorney;

(4) the plaintiff is granted 20 days from receipt of a copy of the defendant's answer and other responsive pleadings within which to file opposing affidavits or other appropriate material, if he wishes to do so. Failure to respond may result in the entry of judgment against plaintiff on the basis of the defendant's responsive pleadings.

Let the Clerk issue process to the defendant. A copy of this order also shall be sent to the plaintiff.

/S/ Richard L. Williams
RICHARD L. WILLIAMS
United States District Judge

Date: FEBRUARY 22, 1982

UNDER CIVIL RIGHTS ACT 42 U.S.C. §1983

NAME: ROY E. DANIELS

PRISONER NUMBER: 26825

PLACE OF CONFINEMENT: Richmond City Jail-F3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Case No. 82-10106-R

ROY E. DANIELS, PLAINTIFF

v.

DEPUTY ANDREW WILLIAMS
RICHMOND SHERIFF DEPARTMENT, DEFENDANT

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes ____ No ###

B. If your answer to A is yes, describe the action in the spaces below. (If more than one action describe the additional actions on the reverse side of this page).

1. Parties to the action: _____

2. Court (if a federal court, name the district; if a state court, name the city or county): _____

3. Docket number: _____

4. Name of judge to whom case was assigned: _____

5. Disposition (for example: Is the case still pending? If not what was the ruling? Was the case appealed? If so, what was the disposition?) _____

C. Did you present the facts relating to your complaint in the state prison grievance procedure?

Yes ### No.___

1. If your answer is yes, what was the result?

No Redress

2. If your answer is no, explain.

D. Statement of Claim:

State here briefly the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of different claims, number and set forth each claim in a separate paragraph. Use as much space as you need; attach extra pages if necessary.

Claim #1.

Supporting FACTS (tell your story briefly without citing cases or law):

On Saturday, January 23, 1982, I was going down the steps to my building to breakfast. As I was walking down the stairs, I slip on a pillow that left on the stairs by the Deputy of the building, (Deputy Andrew Williams, and injured my back and ankle. I was seen by the Doctor, and he prescribed

(Con't. on Claim #2)

Claim #2:

Supporting FACTS (tell your story briefly without citing cases or law):

rest and aspirins, but I am suffering from back pains still.

Claim #3:

Supporting FACTS (tell your story briefly without citing cases or law):

E. State what relief you seek from the Court. Make no legal arguments; do not cite cases or statutes:

I seek monetary and punitive damages of $25,000.00.

Forma Pauperis Affidavit

I hereby apply for leave to proceed with this complaint without prepayment of fees or costs or giving security therefor. In support of my application, I state under oath that the following facts are true:

(1) I am the plaintiff in this complaint, and I believe that I am entitled to redress.

(2) I am unable to repay the costs of said action, or give security therefor, because:

I am a pauper.

(3) I have no assets or funds which could be used to prepay the fees or costs except

None

(Write "none" above if you have nothing; otherwise, list your assets)

/S/

(signature of plaintiff)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF VIRGINIA
Richmond Division

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT

ANSWER

Comes now the defendant, by counsel, who in Answer to the Complaint of the plaintiff filed herein, doth say as follows:

1. He denies that he is indebted to the plaintiff for the reasons set forth in the Complaint or for any other reasons, and denies the plaintiff is entitled to the relief sought.

2. The defendant denies the characterization contained in the Complaint as the plaintiff seeking injunctive and declaratory relief, and monetary damages from the defendant for an alleged violation of the Eighth Amendment. He denies further that the plaintiff is entitled to any relief against him.

3. The defendant admits that 28 U.S.C. Section 1343 (3) and (4), and 28 U.S.C. Section 2201 and 2202 grant jurisdiction in civil rights actions; however, he denies that such an action is present in this Complaint.

DEFENSES

Comes now the defendant, by counsel, and submits the following defenses to the Complaint filed herein by the plaintiff:

1. The defendant has at all times acted in conformity with the Constitution and laws of the United States and of the Commonwealth of Virginia, scrupulously preserving to the plaintiff all rights, privileges and immunities guaranteed to him by the Constitution and laws of the United States and the Commonwealth of Virginia.

2. The defendant denies that any and all actions were taken maliciously against the plaintiff, but allege that all actions that were taken were taken by him in good faith, and under a reasonable belief of the necessity of such actions and the manner in which they were, in fact, carried out.

3. The defendant further states that to the extent that his actions or inactions are relevant to the Complaint filed herein, he has acted reasonably, without malice toward the plaintiff, and on the basis of a good faith belief, which was reasonable in view of all the known facts, that his actions were appropriate, lawful and in fulfillment of his responsibilities.

4. The defendant further states that he is a Constitutional officer of the Commonwealth of Virginia under Article VII, Section 4, of the Constitution of Virginia, which bars the claim and/or causes of action by virtue of the doctrine of sovereign or governmental immunity.

5. The defendant says that as a governmental official performing discretionary acts in relation to the Complaint filed herein and acting within the scope of his authority, he is immune from liability for the consequences of his actions.

6. The defendant expressly denies each and every allegation contained in the Complaint which is not specifically admitted to herein.

7. The defendant says that any conditions complained of by the plaintiff were due to the acts or omissions of others, negligent or otherwise, over whom your defendant exercises no control and for whose actions he is not responsible for at law.

8. The defendant specifically denies that the plaintiff is entitled to damages or injunctive and declaratory relief as requested in the prayer for relief and further denies that the Complaint filed herein states any claim upon which relief can be granted under 43 U.S.C. § 1983.

9. The defendant alleges that he will rely upon all defenses lawfully available to him at the trial of this matter.

10. The defendant hereby consents to exercise of jurisdiction in this civil action by a duly designated U.S. Magistrate pursuant to 28 U.S.C. Section 636 (c) (1), to the full extent permitted in said statute.

11. The defendant further elects appeal to the District Judge with further review by the Fourth Circuit Court of Appeals upon petition for leave to appeal (28 U.S.C. Section 636 (c) (4) and (5)).

WHEREFORE, the defendant requests that the Court deny in all respects each and every prayer for relief contained in the Complaint by the plaintiff and enter judgment in favor of the defendant.

Respectfully submitted,

ANDREW WILLIAMS, Deputy
By James W. Hopper

JAMES W. HOPPER
Of Counsel

JAMES W. HOPPER, p.d..
BAUGH, HORWITZ & HOPPER
1518 Willow Lawn Drive
Suite 100
Richmond, Virginia 23230

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Virginia

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, by counsel, pursuant to Rule 56, Fed. R. Civ. P., and moves this Court for summary judgment to the Complaint filed herein by reason of the following:

1. The defendant submits herewith as Exhibit I his affidavit and as Exhibit II, with enclosures, the affidavit of Nan F. Dean, and respectfully moves this Court to accept the same as evidence in support of this motion. The plaintiff has alleged that he slipped on a pillow left on the stairs by the defendant causing him to fall and injure his back and ankle. For this alleged negligence of the defendant, the plaintiff seeks damages in the amount of $25,000.

2. This defendant submits that he did not leave a pillow on the stairs of the building to which the plaintiff was assigned on January 23, 1982. Furthermore, this defendant stood at the top of the stairs of the building and observed all inmates from the plaintiff's tier proceed down the stairs and into the common hallway. None of the inmates, including the plaintiff, from this tier fell on the steps at that time. (See Exhibit I hereto).

3. This defendant says further that the plaintiff's medical records reflect that approximately 8:15 a.m. on January 23, the plaintiff reported to the jail infirmary complaining of lower lumbar back pains and abrasion on his right ankle as a result of a fall on the stairs in his building. Furthermore, the plaintiff's medical records reflect that he was examined at approximately 1:00 p.m. on that afternoon concerning his

complaint of having fallen on the steps. Finally, the plaintiff's medical records reveal that he has received continuous treatment for these and other complaints while incarcerated at the Richmond City Jail. (See Exhibit II hereto, with enclosures).

4. This defendant respectfully submits that the plaintiff has failed to state a claim of constitutional magnitude. The plaintiff's complaint alleges facts which may state a common law action of negligence for conditions which may have given rise to his alleged injury. It should be noted, however, that § 1983 does not provide a remedy for common law torts. Instead, it creates a federal cause of action against those acting under color of state law to cause a "deprivation of right, privileges, or immunities secured by the Constitution and laws (of the United States)." 42 U.S.C. § 1983. In many cases, the same conduct *may* violate both state law and the federal Constitution, but certainly not all violations of state law rise to the level of a constitutional tort. *See Street* v. *Surdyke*, 492 F.2d 368 (1974),and cases cited therein. This Court has ruled that simple negligence in maintaining prison conditions does not qualify as a due process deprivation in light of its interpretation of the case *Parratt* v. *Taylor*, 101 S.Ct. 1908 (1981). *See Lewis* v. *Hutto, et al.*, CA No. 81-0894-R, Judge Williams (E. D. of Va. January 18, 1982). According, this defendant respectfully submits that this plaintiff has failed to state a claim of constitutional magnitude or a claim upon which relief may be granted in this matter.

WHEREFORE, for the reasons stated above, this defendant respectfully submits that this Court should deny and dismiss the plaintiff's claim herein and enter judgment on his behalf.

Respectfully submitted,

ANDREW WILLIAMS

By James W. Hopper
Counsel

JAMES W. HOPPER, p.d. counsel
BAUGH, HORWITZ & HOPPER
P.O. Box 11435
Richmond, VA 23230

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Virginia

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA,
CITY OF RICHMOND, to-wit:

The affiant, Andrew Williams, first being duly sworn, states that he is a Deputy Sheriff for the City of Richmond employed as a correctional deputy at the Richmond City Jail, has been such during all times mentioned herein, and as such, is competent to make this affidavit.

Affiant further states that he makes this affidavit based upon his own personal knowledge.

Affiant further states that he is familiar with inmate Roy E. Daniels. During all times mentioned herein, inmate Daniels was housed on tier F-3, which is the third floor of the misdemeanant Building (F). On January 23, 1982, affiant followed his normal procedure of opening the gate onto tier F-3 so as to permit the inmates housed therein to exit the tier and proceed down the stairs to go into the common hallway leading into the inmate dining facility. Affiant stood at the top of the stairs and observed the inmates as they proceeded from the dormitory and down the stairs. At no time did any inmate assigned to tier F-3 fall while proceeding down the

stairs and into the common hallway. Therefore, inmate Daniels did not fall down the stairs leading from tier F-3 on January 23, 1982.

/s/ Andrew Walter Williams III
ANDREW WILLIAMS

Sworn and subscribed to before me, a Notary Public in and for the jurisdiction aforesaid, on this 8th day of April, 1982, by Andrew Williams.

Notary Public

My commission expires: April 25, 1985

EXHIBIT II

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Virginia

Civil Action No. 82-0106R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA,
CITY OF RICHMOND, to-wit:

The affiant, Nan E. Dean, first being duly sworn, states that she is the medical administrator at the Richmond City Jail responsible for, among other things, the maintenance of all medical records of inmates incarcerated at the Richmond City Jail, has been such at all times mentioned herein, and as such is competent to make this affidavit.

Affiant further states that she has reviewed the medical records of inmate Roy E. Daniels maintained by her office during the regular and ordinary course of business, and makes this affidavit based upon her own personal knowledge after her review of said records.

Affiant further states that the medical records maintained at her office during the regular and ordinary course of business are attached hereto and specifically incorporated by reference as follows: Enclosure A, nurses notes and Enclosure B, doctors' notes and emergency room records from the Medical College of Virginia.

Affiant further states that inmate Daniels Medical records reflect that at 8:15 a.m. on January 23, 1982, he was examined by A.W. Hous, R.N. at the Richmond City Jail infirmary for complaints of back and ankle pain following a fall on steps. Inmate Daniels medical records reflect that he was referred to Dr. Mainfort that morning for further evaluation. (See Enclosure A-7). Inmate Daniels' medical records reflect

that Dr. Mainfort examined him at 1:00 p.m. on January 23, 1982, and prescribed bed rest and aspirin. (See Enclosure B-6).

/S/ Nan F. Dean
NAN F. DEAN

[HANDWRITTEN MEDICAL RECORDS
OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA,
CITY OF RICHMOND,

On the date in question, while incarcerated at the (RICHMOND CITY JAIL) i was going to chow on January, 23rd 1982 I was the frist one to go down the stairs, Behind me was JOEY CONNELY and ROBERT CLARK, When i got about half way down the stairs, between F2 and F3, I slipped down on a pillow, That was on some news papers, and hit my BACK and ANKLE,

The inmates on F2 saw what happen including MICHAEL NEWS I asked them who left the pillow on the steps, they (inmates) said DEPUTY, WILLIAMS, He (DEPUTY WILLIAMS) was not around at the time of my fall, So i went to the DOCTOR in the messhall and told him what had happened, He said there was no one the infirmary to check me at the time, but would send for me later.

As i was going back to my building, i saw (DEPUTY WILLIAMS) in the hall way leaning against the bars, i asked him if he had left the pillow on the steps he said YES, I told him i had slipped down on the pillow, he neaver said anything else.

I went back to my tier awaiting for the doctor to call me, And my BACK AND NECK began to hurt, i could not stand the pain, So i asked the DEPUTY to let me go to the INFIRMARY to see the doctor.

There are two (2) more witnesses but i can;t get in touch with but one of them, One is at the (RICHMOND, CITY JAIL) the other one is at the (STATE FARM) The one presently in touch is (MICHAEL NEWS).

I am no longer at the (RICHMOND, CITY JAIL) I am now housed at the (VIRGINIA STATE PENITENTIARY) in B-BASEMENT LOCK UP IN CELL #2. I left the jail 4-9-82 received your letter on 4-28-82. If there is any problem concerning WITNESSES, You may contact (ROBERT CLARK) by way of (RICHMOND, CITY JAIL) (JOEY CONNELY) HAS BEEN TRANSFERRED SINCE January.

I REMAIN
/S/ Roy E. Daniels
ROY E. DANIELS

Witnessed by
/S/ Michael J. News
MICHAEL NEWS

Dated: APRIL 26, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

MEMORANDUM OPINION

Plaintiff Roy E. Daniels is an inmate at the Richmond City Jail. He has filed a section 1983 action against Andrew Williams, a correctional deputy stationed at the jail. *See* 42 U.S.C. § 1983 (1976). The plaintiff seeks to recover damages for back and ankle injuries allegedly sustained when he fell on a prison stairway. Daniels asserts that he slipped on a pillow that Williams negligently left on the stairs. The defendant moves for summary judgment on the plaintiff's claim. *See* Fed. R. Civ. P. 56(b).

The court grants the defendant's motion for summary judgment, because the complaint does not state a valid section 1983 claim. Daniels' allegations amount to no more than a simple negligence claim. This claim does not implicate any substantive constitutional guarantees. The plaintiff instead must rely on the contention that the defendant denied him procedural due process.

Under *Parratt* v. *Taylor*, 451 U.S. 527 (1981), procedural due process requires only a meaningful postdeprivation remedy, unless the deprivation in question was pursuant to an established state procedure. *See id.* at 541. The *Parratt* decision dealt only with negligent property deprivations. *See id.* at 536-37. The court, however, holds that *Parratt* also applies to nonproperty deprivations such as the personal injury alleged here. *See id.* at 541; *Rutledge* v. *Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3998.23 (July 2, 1982); *Irshad* v.

Spann, Civil No. 81-0456-R, slip op. at 6 n.1 (E.D. Va. July 19, 1982); *Frazier* v. *Collins*, 538 F. Supp. 603, 607 (E.D. Va. 1982).

The official misconduct for which Daniels seeks redress was an isolated action in violation of state procedure. The due process clause, therefore, requires only a meaningful post deprivation remedy. *See Parratt* v. *Taylor*, 451 U.S. at 541; *Irshad* v. *Spann*, Civil No. 81-0456-R, slip op. at 5-6. Virginia law provides such a remedy in the form of a common-law negligence action. *See id.* at 7-10. Thus, the defendant's conduct did not violate the plaintiff's due process rights.

For these reasons, the court holds that Daniels' claim is not actionable under section 1983. The court, therefore, must dismiss his action.

/S/ Richard L. Williams
RICHARD L. WILLIAMS
United States District Judge

Date: AUGUST 2, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

ORDER

In accordance with the accompanying memorandum, the court DISMISSES the complaint and enters judgment for the defendants.

Should the plaintiff desire to appeal, written notice must be filed with the Clerk of the Court within 30 days of this date.

Let the Clerk send copies of this order and memorandum to the plaintiff and to counsel for the defendants. The Clerk also shall send both parties a copy of the court's recent opinion in *Irshad* v. *Spann*, Civil No. 81-0456-R (E.D. Va. July 19, 1982).

/S/ Richard L. Williams
RICHARD L. WILLIAMS
United States District Judge

Date: AUGUST 2, 1982

UNITED STATES COURT OF APPPEALS
FOR THE FOURTH CIRCUIT

No. 82-6538

ROY E. DANIELS, APPELLANT

v.

ANDREW WILLIAMS, DEPUTY, APPELLEE.

Argued May 13, 1983.
Decided Aug. 24, 1983.

---

720 F.2d 792

Louis James Licata, Third Year Law Student (Professor ephen A. Saltzburg, University of Virginia Law School, harlottesville, Va., on brief), for appellant.

Dennis A. Barbour, Roanoke, Va. (James W. Hopper, ardner, Moss, Brown & Hopper, P.C., Roanoke, Va., on rief), for appellee.

Before HALL and SPROUSE, *Circuit Judges*, and TURK,* *Chief Judge.***

TURK, *Chief Judge:*

Roy E. Daniels (Daniels), an inmate at the Richmond City Jail, brought this section 1983 action against Deputy-Sheriff Andrew Williams (Williams) alleging that he was injured when he slipped and fell on a pillow negligently left on the stairs by Williams. The district court granted Williams's motion for summary judgment, reasoning that under *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), Daniels's allegations failed to state a procedural due process claim because Virginia provided a meaningful postdepriva-

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* Honorable James C. Turk, Chief United States District Judge for the Western District of Virginia, sitting by designation.

** Judge Sprouse was not present during oral argument; however, counsel agreed that he could participate by listening to the tapes.

tion remedy in the form of a common law negligence action. Daniels appeals on the grounds that *Parratt's* analysis concerning the adequacy of a postdeprivation remedy should not be applied to the deprivation of a nonproperty interest, and, even if it does apply, that the Virginia doctrine of sovereign immunity denies him an adequate postdeprivation remedy. We affirm the district court's dismissal of Daniels's action.

A.

The plaintiff in *Parratt* alleged that he was deprived of property without due process of law when prison officials negligently lost his hobby kit. The Court agreed that the plaintiff had been deprived-of property within the meaning of the fourteenth amendment. *Id.* at 536-537, 101 S.Ct. at 1913-1914. The Court held, however, that the plaintiff had not stated a claim for a violation of the due process clause of the fourteenth amendment. Rejecting the proposition that due process always requires a hearing before the initial property deprivation, Justice Rehnquist stated in a plurality opinion that a meaningful postdeprivation hearing satisfies the requirements of procedural due process in situations where the property deprivation does not result from established state procedure and the state cannot practically provide a meaningful deprivation hearing. *Id.* at 540-541, 101 S.Ct. at 1915-1916. Applying this principle to the plaintiff's allegation that he was tortiously deprived of his property as a result of a state employee's random and unauthorized act, the Court concluded that the plaintiff was not deprived of property without due process of law because the state's statutory tort procedure provided him with a postdeprivation remedy that satisfied the requirements of procedural due process.[1] *Id.* at 543-544, 101 S.Ct. at 1916-1917.

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[1] Exhaustion of state judicial or administrative remedies is not a prerequisite to section 1983 actions, *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), except for those cases falling under the narrow exhaustion scheme embodied in 42 U.S.C. § 1997. *See Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). *Parratt* does not change this rule. An exhaustion requirement would merely require a plaintiff to exhaust his state remedies before bringing a section 1983 action in federal court. *Parratt*, by contrast, stands for the proposition that a plaintiff may sue only in state court if he fails to state a procedural due process claim under section 1983. Un-

Like the plaintiff in *Parratt*, Daniels alleges that he was injured by the negligence of a state employee. Unlike in *Parratt*, Daniels's claim is for bodily injury rather than for the loss of personal property. "Liberty" within the meaning of the fourteenth amendment includes the right to be free from "unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977). Bodily injury resulting from a state official's negligence therefore deprives a person of a liberty interest protected by the fourteenth amendment.[2] This case thus presents the question whether the *Parratt* analysis applies to nonproperty deprivations, such as a negligent deprivation of a liberty interest.

Parratt concerned a property interest; its scope, however, "cannot easily be limited to negligent deprivations of property." *Palmer v. Hudson*, 697 F.2d 1220, 1222 (4th Cir.1983), *cert. granted*, ___ U.S. ___, 103 S.Ct. 3535, 77 L.Ed.2d 1386 (1983). Because *Parratt's* underlying principle is that a postdeprivation hearing will satisfy procedural due process when there is no practical way to provide a predeprivation hearing, logic dictates that *Parratt* should also apply to a nonproperty deprivation for which a deprivation hearing was impractical. Justice Rehnquist made no distinction in *Parratt* between property and nonproperty deprivations. Rather, the relevant distinction is between isolated acts of misconduct which are not amenable to prior control and deprivations resulting from established state procedure; this factor determines whether a meaningful postdeprivation remedy will satisfy the requirements of procedural due process.

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like an exhaustion requirement, which is based upon principles of comity, the *Parratt* analysis is based upon the concept that there is no constitutional violation if a plaintiff has not been deprived of a protected interest without due process of law.

[2] Some bodily injuries also implicate a protected property interest, as is recognized by the existence of a common law tort action to recover damages for negligently caused personal injuries. However, because *Parratt* expressly applies to negligent property deprivations, our analysis will focus on Daniels' claim that he was deprived of liberty without procedural due process.

In addition, application of *Parratt* to nonproperty deprivations such as Daniels's alleged bodily injury is consistent with the Court's stated goal in *Parratt* to provide courts with assistance in determining "the correct manner in which to analyze claims . . . which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts, but instead are couched in terms of constitutional deprivation and relief is sought under § 1983." *Id.* 451 U.S. at 533, 101 S.Ct. at 1912.

The conclusion that *Parratt* was intended to apply to all types of deprivations resulting from the unauthorized acts of state officials which are not amenable to prior review is further reinforced by the concurring opinion of Justice Powell. Justice Powell argued that the alleged negligent loss of the plaintiff 's property by the state officials did not constitute a deprivation of property within the meaning of the fourteenth amendment. *Id.* at 546, 101 S.Ct. at 1918. And he criticized the Court's focus on the adequacy of the postdeprivation remedy because such would make the fourteenth amendment a font of tort law whenever a state failed to provide a remedy. *Id.* at 550, 101 S.Ct. at 1920. In so doing, however, he recognized that the Court's analysis applies to "negligent invasions of liberty or property interests." *Id.*

Moreover, *Ingraham v. Wright*, *supra*, is cited by the Court as being consistent with the approach taken in *Parratt*. 451 U.S. at 542 and 547, n.1, 101 S.Ct. at 1916 and 1919, n.1 (Powell, J., concurring in result). In *Ingraham*, the Court addressed the claim that corporal punishment in public schools violated due process. *See* 430 U.S. at 653, 97 S.Ct. at 1403. The Court held that corporal punishment in public schools did not deprive school children of liberty without due process of law because, among other things, "the traditional common-law remedies are fully adequate to afford due process." *Id.* at 672, 97 S.Ct. at 1413. *Parratt's* citation of *Ingraham* with approval is compelling evidence that the Court intended the *Parratt* analysis to apply to deprivations of liberty interests.

Not all the justices who joined in the Court's decision in *Parratt* believed that it applied to nonproperty deprivations. Justice Blackmun, with whom Justice White concurred, did

"not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty." 451 U.S. at 545, 101 S.Ct. at 1918. But Justices Blackmun and White offered no persuasive reason for their distinction between property and nonproperty deprivations. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), cited as different yet analogous precedent supporting this distinction, concerned a substantive due process claim, *see id.* at 502-03, 97 S.Ct. at 1937-38, and thus is distinguishable from cases, such as this one, involving alleged procedural due process violations.

Although Daniels concedes that not every liberty deprivation by a state official should be redressed by an action under section 1983, he stresses that the state has an affirmative duty to protect inmates because of the high level of state control in the prison environment. And he argues that *Parratt's* analysis should not apply to this case because a section 1983 remedy is the only way to ensure the state's compliance with this duty. We believe, however, that the Virginia courts are no less diligent than the federal courts in protecting inmates from state inflicted harm. Moreover, there is nothing in *Parratt* which lends support to the proposition that its rationale applies differently to prisoners than to nonprisoners. Indeed, the fact that the plaintiff in *Parratt* was himself an inmate militates against the adoption of Daniels's proffered distinction.

Therefore, we hold that the *Parratt* analysis applies to deprivations of nonproperty interests which do not violate substantive constitutional rights, including negligent deprivations of the liberty interest in freedom from bodily injury. *See Ellis v. Hamilton*, 669 F.2d 510 (7th Cir.), *cert. denied*, ___ U.S. ___, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, ___ U.S. ___, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983).[3]

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[3] *See also Hickman v. Hudson*, 557 F.Supp.1341 (W.D.Va.1983); *Juncker v. Tinney*, 549 F.Supp.574 (D.Md.1982); *Holmes v. Wampler*, 546 F.Supp. 500 (E.D.Va.1982); *Henderson v. Counts*, 544 F.Supp.149 (E.D.Va.1982); *Peery v. Davis*, 524 F.Supp. 107 (E.D.Va.1981); *Eberle v. Baumfalk*, 524 F.Supp. 515 (N.D.Ill.1981); *Meshkov v. Abington Township*, 517 F. Supp. 1280 (E.D.Pa.1981); *but see Howse v. DeBerry Correc-*

Daniels alleges that Williams's negligence in leaving a pillow on the stairs deprived him of a liberty interest. There is no allegation that Daniels was injured as a result of some established state procedure. Nor was it possible for the state to provide a predeprivation hearing since the state could not predict when the alleged loss would occur. Consequently, *Parratt* applies to this case.

B.

Having decided that *Parratt* applies to this case, we must next determine whether Daniels has been deprived of liberty without due process of law. This in turn requires an evalua-

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tional Institute, 537 F.Supp.1177 (M.D.Tenn.1982); *Haygood v. Younger*, 527 F.Supp. 808 (E.D.Cal.1981).

We emphasize that our holding today is not intended to expand *Parratt's* scope to every section 1983 action which resembles a state tort action. *Parratt* applies to only procedural due process claims involving deprivations that do not result from established state procedures and for which the state cannot practically provide a deprivation hearing. Section 1983 still provides a remedy for procedural due process violations resulting from some established state procedure or for which a prior hearing is practical, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-437, 102 S.Ct. 1148, 1157-1158, 71 L.Ed.2d 265 (1982), and for violations of substantive constitutional rights. *See Palmer*, 697 F.2d at 1222, n.2. For example, *Parratt* is inapplicable to eighth amendment claims arising out of a state official's medical malpractice or negligence which amounts to deliberate indifference to serious health and safety needs of prisoners. *See generally Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Withers v. Levine*, 651 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980). Similarly, *Parratt* would not apply to substantive due process violations resulting from a police officer's unjustified, brutal beating of a suspect, *see Henderson v. Counts*, 544 F.Supp. at 152-153, or grossly negligent shooting of a suspect which amounts to a "raw abuse of power." *Jenkins v. Averett*, 424 F.2d 1228, 1232 (4th Cir.1970). In these kinds of cases involving alleged violations of substantive constitutional rights, therefore, the presence or absence of a state remedy is irrelevant to whether a claim is stated under section 1983. Consequently, before dismissing a section 1983 action under *Parratt*, a court should scrutinize the complaint to ensure that it does not include allegations of violations of substantive constitutional rights in addition to an allegation of a procedural due process violation. *See generally Hickman v. Hudson*, *supra*; *Juncker v. Tinney*, *supra*; *Holmes v. Wampler*, *supra*; *Henderson v. Counts*, *supra*.

tion of whether Virginia law provides him with a meaningful postdeprivation remedy.

Virginia law provides Daniels with a common law action for negligence.[4] Nevertheless, Daniels strenously argues that the Virginia doctrine of sovereign immunity denies him an adequate postdeprivation remedy. *See Subica v. Hutton*, No. 81-328-AM (E.D.Va. Nov. 17, 1982) (unpublished).

In his answer, Williams invoked the defense of sovereign immunity from liability for his alleged negligence. The Supreme Court of Virginia has "listed certain factors to consider in determining whether a state employee is entitled to immunity when he or she is charged with simple negligence in the performance of some duty." *Bowers v. Commonwealth, Dept. of Highways and Transportation*, ___ Va. ___, ___, 302 S.E.2d 511, 514 (1983).

> Under such circumstances, [a court should] examine the function [the] employee was performing and the extent of the state's interest and involvement in that function. Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative .... Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved.

James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).

Daniels alleges that Williams negligently left a pillow on the stairway. Applying the ministerial-discretionary factor, a state court could overrule Williams's plea of immunity because the alleged negligence underlying Daniels's claim was misfeasance of a ministerial duty. *See Phelps v. Anderson*, 700 F.2d 147, 149 (4th Cir.1983); *Semler v. Psychiatric Institute*, 538 F.2d 121, 127 (4th Cir.1976); *First Virginia Bank-Colonial v. Baker*, ___ Va. ___, 301 S.E.2d 8 (1983);

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[4] Daniels's alleged injury occurred on January 23, 1982. The Virginia Tort Claims Act, Va. Code § 8.01-195.1 *et seq.* (Supp.1982), applies only to actions accruing on or after July 1, 1982. Under the Act, Virginia is made liable for negligent acts or omissions of state employees, but "[n]otwithstanding any provision [of the Act], the individual immunity of judges, the Attorney General, Commonwealth's attorneys, and other public officers, their agents and employees from tort claims for damages is hereby preserved to the extent and degree that such persons are presently immunized." Va.Code § 8.01-195.3 (Supp.1982).

Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973). On the other hand, the state's interest and involvement in prison administration is great, and a state court may thus determine that Williams is entitled to immunity. *See Dalson v. Hutto*, No. LD 1131, Vol. 8, No. 1 VADA Quarterly 15 (Cir.Ct. Richmond, Nov. 29, 1982). In short, we cannot confidently predict whether sovereign immunity would apply in this case. Consequently, we must determine whether the possibility of a sovereign immunity defense deprives Daniels of an adequate postdeprivation remedy.

In responding to the argument that Nebraska's tort claims procedure did not adequately protect the plaintiff's property interest because it did not provide him with all the relief available in actions brought under section 1983, the Court held in *Parratt* that the state remedies were sufficient to satisfy the requirements of due process because the "remedies provided *could have* fully compensated the [plaintiff] for the property loss he suffered." 451 U.S. at 544, 101 S.Ct. at 1917 (emphasis added). Thus, *Parratt* does not require that a plaintiff actually receive a remedy for the deprivation of his interest. Instead, *Parratt* holds that procedural due process is satisfied if, in cases where a deprivation hearing is impractical, the state provides a means by which the plaintiff can be compensated for his loss. In other words, under *Parratt* the requirements of due process are satisfied by the provision of a hearing before a tribunal with the power to grant a remedy. *See Groves v. Cox*, 559 F.Supp. 772 (E.D.Va. 1983).

Daniels contends, however, that he is denied due process under *Parratt* because he could be precluded from bringing any claim in any court if his section 1983 action is dismissed and Williams's plea of immunity is sustained. While we agree that this result could deprive Daniels of a remedy, it does not follow that it would deprive him of his right to present a claim and be heard. To be sure, Daniels will be unable to litigate the merits of his claim if a state court determines that Williams is entitled to sovereign immunity. But while due process may sometimes require a state to consider the merits of a plaintiff's charge before deciding whether to terminate his claim, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), it does not

entitle "every civil litigant to a hearing on the merits in every case." *Id.* at 438, 102 S.Ct. at 1158. Rather, due process requires "an *opportunity* ... granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case ...." *Id., quoting Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (citations omitted). And we conclude that Virginia's common law tort action provides Daniels with a meaningful opportunity for a hearing appropriate to the nature of his claim.[5]

Nor does sovereign immunity itself violate due process. "For when a state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Ferri v. Ackerman*, 444 U.S. 193, 198, 100 S.Ct. 402, 406, 62 L.Ed.2d 355 (1979); *see Martinez v. California*, 444 U.S. 277, 280-283, 100 S.Ct. 553, 556-558, 62 L.Ed.2d 481 (1980).

Daniels further argues that the doctrine of sovereign immunity deprives him of a postdeprivation remedy at a meaningful time and in a meaningful manner. *See* 451 U.S. at 540, 101 S.Ct. at 1915. He asserts that, unlike litigation on the question of good faith in a section 1983 action, which is determined only after a full hearing on the merits, litigation on the issue of sovereign immunity precludes a hearing on the merits unless and until the plea of immunity is overruled. This may be true insofar as a determination of whether sovereign immunity applies is compared with a determination of whether qualified immunity applies in a section 1983 action. *But see Harlow v. Fitzgerald*, 457 U.S. 800, 817-819, 102 S.Ct. 2727, 2738-2739, 73 L.Ed.2d 396 (1982). Nevertheless, this argument overlooks the fact that due process is not violated by other affirmative defenses, such as the statute of limitations, which must be decided prior to litigation on the

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[5] Our conclusion, of course, would be different if Virginia's sovereign immunity doctrine had the effect of depriving a prisoner of the right to bring a claim in state court and be heard on the issue of sovereign immunity. *See Parratt*, 451 U.S. at 551, n.9, 101 S.Ct. at 1921, n.9 (Powell, J., concurring in result).

merits. And contrary to Daniels's assertion, he is no more denied a remedy at a meaningful time and in a meaningful manner by the chance that he may be required to litigate the question of sovereign immunity through the entire Virginia court system than he would be by having to appeal an adverse ruling on a plea of the statute of limitations. We therefore see no significant distinction between sovereign immunity and other defenses which persuades us that Daniels is denied an adequate postdeprivation remedy by the possibility that Williams may be entitled to immunity.

In sum, Virginia's common law tort action provides Daniels with a remedy which can fully compensate him for the alleged liberty deprivation. Thus, despite the possibility of a sovereign immunity defense, we hold that Daniels possesses a remedy which provides him with a "meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." 451 U.S. at 541, 101 S.Ct. at 1916. Consequently, we conclude that Daniels has failed to state an actionable claim under section 1983 because he has not been deprived of liberty without due process of law.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-6538*

ROY E. DANIELS, APPELLANT

v.

ANDREW WILLIAMS, DEPUTY, APPELLEE

APPEAL FROM THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND, RICHARD L. WILLIAMS, DISTRICT JUDGE. (CA 82-0106-R)

On Petition for Rehearing:
Argued: December 6, 1983 **Decided November 16, 1984**
(748 F.2d 224)

Before WINTER, *Chief Judge*, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, *Circuit Judges*, sitting en banc.

Russell Williams, Third Year Law Student (Robert E. Shepherd, Jr., University of Richmond School of Law, Patricia L. Harrington, Third Year Law Student, on brief), Stephen Saltzburg, for Appellants; James W. Hopper, Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia, on brief) for Appellees.

WIDENER, *Chief Judge:*

This case is an appeal from a judgment for the defendant in an action brought under 42 U.S.C. § 1983. We affirm.

Roy Daniels was a prisoner in the Richmond city jail on January 23, 1982, when he slipped and fell on a pillow and newspapers negligently left on some stairsteps by the de-

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* This case was argued together with *Ausley* v. *Mitchell*, No. 82-6128, and *Poole* v. *Morris*, No. 82-6143.

fendant Williams, a deputy sheriff. The fall resulted in injuries to Daniels' back and ankle, for which he received medical treatment. While the facts surrounding Daniels' fall may be disputed, the district court found a common law negligence remedy available to Daniels and dismissed the case for failure to state a cause of action. Thus, for the purposes of this opinion, we assume that Daniels fell and that his fall was caused by Williams' negligence.

Daniels' suit must fail for two alternate reasons, either of which is fatal to his claim. The first is that we are of opinion Daniels' bodily injury occasioned by simple negligence was not a liberty interest protected by the due process clause.[1] Second, even if Daniels had a liberty interest violated by the negligence of Williams, then he had a remedy under the law of Virginia which satisfied the requirements of procedural due process.

I.

Parratt v. *Taylor*, 451 U.S. 527 (1981), decided that the negligent loss of two packages of hobby materials, belonging to one prisoner, and lost by a prison employee and another prisoner, was a deprivation of property under the Fourteenth Amendment. *Parratt* p. 536-537. The Court went on to decide, however, that because Nebraska provided a tort remedy as a means of redress for property deprivation, the deprivation was not without due process of law.

Until *Parratt* was decided, in this circuit a claim of mere negligence did not give rise to a cause of action under § 1983. We decided that explicitly in *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970), in which, however, we granted relief in a case where the defendant's actions were variously described to be gross and culpable, wanton and a raw abuse of power, but falling short of an intentional act. So our decision in *Jenkins* so far as property is concerned now gives way to *Parratt*.[2]

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[1] There is no claim of any substantive due process violation. The facts here are not nearly aggravated enough to even make the proposition arguable. See, generally, *Hall* v. *Tawney*, 621 F.2d 607 (4th Cir. 1980).

[2] While the dissenting opinion's analysis of the majority's position, that of extraordinary reluctance to change circuit precedent, may have been helpful in staking out its position, it sets up a strawman to disagree with.

We do not believe the Court intended *Parratt* to be applied automatically in a per se manner in every intance in which an act of negligence can also be stated as a § 1983 claim. The Court itself noted, at p. 534, quoting Baker *v. McCollan*, that "[T]he question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action."

In *Parratt*, the concluding paragraph of the opinion of the Court took pains to explicitly disavow construing its decision so that it might result in "turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." 451 U.S. at 544. The Court continued:

> "It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever circumstance may already be administered by the States.' *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." 451 U.S. at 544.

Thus, the Court, by explicitly rejecting a construction of its opinion which would permit maintaining a § 1983 claim

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Of course the reasoning of *Jenkins* is not consistent with *Parratt*, as *Parratt* makes mere negligence actionable, while *Jenkins* requires more, and, of course, circuit precedent must give way to the superior authority of the Supreme Court. Even the suggestion that these propositions are not acknowledged by the majority is too far fetched to merit more than summary denial. But recognition of the fact that the *result* which *Jenkins* would obtain when applied to a negligent injury to the person happens to agree with the *result* required by *Parratt* in the same situation, indicates not a reluctance on the part of the majority to change circuit precedent, rather the failure of the dissent to acknowledge that *Parratt* and *Jenkins* require similar results on the same fact situation but for different reasons as the majority opinion indicates. We follow *Parratt*.

for bodily injuries based on the negligent operation of an automobile by a state official acting under color of law, has limited its decision. Because we doubt that the Court intended to convey the impression that a prisoner suffering bodily injury from the negligence of a state official stands on a better footing than an ordinary citizen so injured, we think the Court intended to limit its decision to claims for the deprivation of property asserted by a prisoner, and we so hold. The difference in treatment between a prisoner's property and his person may easily be justified. The demands of prison safety, life, and discipline make it obligatory for prison officials to have possession of, and search at some time or another, all of the property belonging to every prisoner. Prisons could be operated in no other fashion. Because the state of necessity has such complete control of the prisoner's property, calling it to account for the unexplained loss thereof is not inconsistent with demands of the Fourteenth Amendment. No such reasons exist, however, to set the prisoner above the ordinary citizen in the protection of his person. If the ordinary citizen may not sue under § 1983 a state employee who has negligently deprived him of a liberty interest by injury to his person, then the prisoner should not be allowed to prosecute a similar claim. The Supreme Court has expressed the same thought in a different context. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,"[3] neither should negligent injury to the person.

We are thus of opinion the negligent injury to the plaintiff's person is not a protectable liberty interest under the due process clause and the complaint does not state a cause of action under § 1983 on that account.

II.

It is not disputed that in Virginia at all times here pertinent a common law tort action for negligence might have been maintained against a state employee performing minis-

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[3] *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976).

terial duties. While the State is immune,[4] see *James* v. *Jane*, 221 Va. 43, 267 S.E.2d 108, 113 (1980), the employee is not. *First Virginia Bank-Colonial* v. *Baker*, 225 Va. ___, 301 S.E.2d 8 (1983). The sovereign immunity which may attach to employees performing discretionary duties does not attach to those performing ministerial acts.

This was made clear in our recent case of *Phelps* v. *Anderson*, 700 F.2d 147 (4th Cir. 1983), and most recently, as we have noted above, by *First Virginia Bank-Colonial* in the state courts. In *Phelps*, prison employees had negligently deprived a prisoner of the use of his television set for a period of time. A prison adjustment committee had decided that the plaintiff owned the set and the prison employees' negligent failure to return the set to the rightful owner, we held, was an act in which they had no discretion, and accordingly, because that prisoner had the right to proceed under Virginia law, we held that *Parratt* barred his § 1983 claim. In *First Virginia Bank* the suit was against the clerk of a court whose deputy had negligently indexed a deed of trust on the wrong page of the index book. The Virginia court held that act to be ministerial and allowed a suit to proceed against the clerk on account of the negligence of the deputy.

In the case at hand, there is no claim that the deputy sheriff, Williams, was exercising any discretionary duty when he left the pillow on the stairsteps, so his actions at the most, looking at the case in the best light from Daniels' side, were merely ministerial. Because Williams' duties were ministerial, it was possible for Daniels to maintain an action in the Virginia courts on account of his injury without being met with the defense of sovereign immunity. Thus, even if Daniels were deprived of a liberty interest protected by the Fourteenth Amendment, the deprivation was not without due process of law under *Parratt* because a post-deprivation remedy was available in the state courts.

The plaintiff argues that sovereign immunity is available to Daniels as a defense, and it follows, the argument goes,

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[4] Virginia recently enacted a Tort Claims Act, Va. Code § 8.01-195.1 *et seq* (Supp. 1982), which applies to acts occurring on or after July 1, 1982, and which surrenders the immunity of the Commonwealth for certain torts under specified conditions. That statute, of course, would have no effect in this case.

that if sovereign immunity is available as a defense, any remedy he may have under state law may be inadequate and not in fact a remedy. The defendant argues that any immunity which may exist under state law is little different from the immunity afforded state officials in the federal courts in suits under § 1983, and continues that since the immunities involved are akin, even if not the same, then the existence of immunity should not serve to permit the suit to be maintained. Because we believe there is no significant difference in the duties of the deputy sheriff in this case, the prison officials in *Phelps*, and the deputy clerk of the court in *Baker*, we think the duties of Williams were ministerial and do not reach the question of whether or not the existence of a possible immunity defense should permit the action to be maintained under § 1983.[5]

The judgment of the district court is AFFIRMED.

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[5] We have grave doubt that the immunity question, whether the acts complained of were discretionary or ministerial, has any proper place in this case in any event, since the case involves a sheriff and not some other public employee or officer. In *Dabney* v. *Taliaferro*, 25 Va. (4 Rand.) 256 (1826), the court held that a sheriff was held to a standard of ordinary care ("omission and neglect" was the exact phraseology) in the keeping of a prisoner by a contract jailer. If a suit may be maintained against a sheriff directly, it could probably be maintained against a deputy, and, even if not, the remedy afforded against the sheriff would satisfy the requirements of *Parratt*.

Our position with respect to this matter is supported by the statement in *First Virginia Bank* that "...we find no logic in a rule that exempts him [a clerk of the court] from the doctrine of *respondeat superior* whether the wrong committed by his deputy is discretionary or ministerial in character." 301 S.E.2d at p. 12. *First Virginia Bank* also noted with approval *Moore's Adm.* v. *Downey, et al*, 13 Va. (3 H.&M.) 127 (1808), and the statement in that case that "[t]he law looks upon the sheriff and his officers as one person; he is to look to his officers that they do their duty; for if *they* transgress, *he* is answerable to the party injured by such transgression; and his officers are answerable *over* to him." 13 Va. (3 H.&M.) at p. 132; 301 S.E.2d at p. 11, n.3.

Because the parties have not approached the case from this angle, we express no opinion on the subject, but, to repeat, whether or not there is necessarily any immunity question in the case seems doubtful.

PHILLIPS, *Circuit Judge*, dissenting in part and concurring in part:

The majority affirms dismissal of Daniels's claim under 42 U.S.C. § 1983 on alternative grounds. First, that as a matter of general principle there is no constitutionally protected liberty interest in being free of bodily injury caused by merely negligent, as opposed to intentional, conduct of state agents, or, put differently, that the merely negligent infliction of bodily injury by a state agent does not constitute "deprivation" of any constitutionally protected liberty interest; second, that even if such an interest in general exists, or such a deprivation might in general occur, any deprivation occurring here was not without due process because the state provides an adequate post-deprivation remedy for Daniels in the form of a traditional common law personal injury negligence action. Since § 1983 requires proof both that there has been deprivation of a constitutionally protected liberty (or property) interest and that it shall have occurred without due process, no cognizable § 1983 claim is here stated.

I disagree with the first ground.

On the second, I agree that with respect to the kind of negligent deprivation of liberty interest here involved a state's post-deprivation tort remedy may provide the process constitutionally due; but I do not believe that due process is provided if a sovereign immunity defense is available to bar the state's post-deprivation remedy. And because I do not believe that on the record before us we can determine whether that defense is so available, I would only affirm dismissal of this § 1983 claim on condition that it might be reinstated if the defense is drawn upon to bar his state claim in state court

I therefore dissent to the outright dismissal mandated by the majority.

I

As I understand the majority's reasoning on the first ground—that there is no constitutionally protected liberty interest in being free of bodily injury inflicted negligently by state agents—it runs as follows. Until *Paratt* v. *Taylor*, 451

U.S. 527 (1981), decided that one could be "deprived" of a constitutionally protected property interest by negligent conduct of state agents, the law of this circuit had been that only intentional conduct could "deprive" of either property or liberty interests. *Parratt* decided only that one might be so deprived of property interests; hence prior circuit law respecting the deprivation of liberty interests is unaffected by intervening Supreme Court authority and remains that one may not be so deprived of liberty interests. By implication, circuit law on liberty interests should not in this case by brought into conformity with *Parratt's* new dispensation as to property interests, because there are rational bases for maintaining the distinction first necessitated by *Parratt*.

With respect, I simply disagree with this analysis.

First off, I do not believe that the critical principles that emerged from *Parratt* can be read as being narrowly confined to property interests. It is true that the case was about a property interest so that the specific holding is so limited, but the threshold issue identified and addressed in the majority opinion was "whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532. And this issue was answered affirmatively, if somewhat obliquely, in the same broad terms in which it was put by the Court: "§ 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind." 451 U.S. at 535.

All of the other Justices writing in the case assumed that a necessary implication of the majority's holding on this point was that it applied to liberty as well as property interests. Justice Powell, concurring, was principally concerned that "deprivation" should not be construed to cover any but intentional acts, and he unmistakably assumed, as his references show, that the Court's opinion applied to deprivations of liberty as well as property interests. 451 U.S. 546-554 & nn.6, 7, 9. Justice Stewart, concurring, also plainly assumed that the majority's specific holding that deprivations of property might be by negligent conduct necessarily would apply in logic as well to deprivations of liberty. 451 U.S. at 544-45 (Stewart, J., concurring). Justice Blackmun, concurring,

joined by Justice White, was only concerned that the majority's post-deprivation remedy analysis should be confined to property cases and not extended to claimed deprivations of life or liberty, clearly assuming that deprivation of either might be by negligent or intentional conduct. 451 U.S. at 545-46.

I therefore believe that whatever may have been the pre-*Parratt* state of circuit law, *Parratt* made it plain as national law that whether challenged conduct was negligent or intentional is irrelevant to the threshold § 1983 question whether it was committed under color of state law and whether it deprived a person of federally secured rights, *see Parratt*, 451.U.S. at 535, and that this is true whether the rights allegedly violated involved property or liberty interests.[1]

Furthermore, I doubt that it is accurate to suggest that before *Parratt*, this circuit had never recognized any § 1983 claim based on mere negligence. Certainly we had recognized such claims in the congruent eighth amendment context. *See, e.g., Withers* v. *Levine*, 615 F.2d 158, 162 (4th Cir.), *cert. denied*, 449 U.S. 827 (1980) (negligent failure to protect prison inmate against known threats of physical harm).[2]

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[1] The majority here relies heavily on the *Parratt* majority's specific expression of concern about § 1983 being extended to cover "an automobile accident with a state official," *see* 451 U.S. at 544, as showing an intention by that *Parratt* Court to confine its "deprivation by negligence" holding to cases involving property interests. But the language quoted occurs in a passage laying out a general justification for finding in state post-deprivation remedies an appropriate means by which to prevent § 1983's extension to *all* negligence cases. Indeed, the *Parratt* Court's hypothetical automobile accident could presumably have given rise both to property damage and personal injury claims; the Court is saying that *both* are being kept out of § 1983's reach by the post-deprivation remedy solution.

[2] The majority says that in *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970), we had decided explicitly that a claim of "mere negligence" did not give rise to a cause of action under § 1983. With all deference, I suggest that the language referred to in *Jenkins* was *dicta* that has necessarily been treated as such in later pre-*Parratt* cases such as *Withers*. *See also McCray* v. *Maryland*, 456 F.2d 1, 5 (4th Cir. 1972) (Sobeloff, J.) (holding that "a section 1983 action may be based on negligence when it leads to a deprivation of rights," citing *Jenkins*).

Finally, with all deference, I simply cannot accept the majority's apparent holding that somehow the fourteenth amendment imposes a more stringent duty upon the states to avoid deprivations of the property than the liberty interests of either their prison inmates or citizens in their free societies. If there is a constitutional scale of values associated with the two kinds of interests, the majority's analysis seems to me to stand on its head the obvious rank order that would be assigned them. *See Parratt*, 451 U.S. at 542 (suggesting that an intentional deprivation of liberty interests is "arguably ... more egregious" than a negligent deprivation of property interests); *id.* at 545 (Blackmun, J., concurring) (suggesting that deprivations of liberty interest might not be adequately remedied by state post-deprivation process through deprivations of property interests could be). Certainly in purely human terms it would be difficult to suppose that the Constitution assigned less value to the concededly modest bodily harm allegedly suffered in this case than the Supreme Court in *Parratt* held that it assigned to the loss of a $23.50 hobby kit.

I would therefore hold, contrary to the majority, that Daniel's complaint states a cognizable § 1983 claim that he was deprived of a liberty interest by the defendant acting under color of state law. This would then lead to the question whether the complaint had also sufficiently alleged that the deprivation was without due process.

The specific holding in *Jenkins* was that the non-intentional infliction of harm there in issue was cognizable in § 1983 because of its particular quality of wantonness and degree. This was thought to amount to a "substantive due process" violation, and the language referred to by the majority was simply setting in contrast negligent inflictions of harm not rising to that level. In retrospect, *Jenkins* and other pre-*Parratt* substantive due process decisions are properly seen as harbingers of the principle that for some deprivations of secured interests—including those caused by "mere negligence"—post-deprivation state remedies *may* supply the process constitutionally due that makes them not cognizable under § 1983. Thus the holdings of those cases are not that "mere negligence" can never deprive of constitutionally secured interests and thus support cognizable § 1983 claims, but that some such deprivations are of such a character that no state post-deprivation remedy could constitute due process. *See Palmer v. Hudson*, ___ U.S. ___, ___, 52 U.S.L.W. 5052, 5058 n.4 (U.S. July 3, 1984) (Nos. 82-1630 and 82-6695) (Stevens, J., concurring).

II

On the due process question, I think it plain that *Parratt's* principal holding that a state's post-deprivation remedies may supply the due process that suffices to defeat an otherwise cognizable claim of rights deprivation under § 1983 applies to liberty as well as property interests. Indeed, the general principle had already been established in the pre-*Parratt* liberty interest case of *Ingraham* v. *Wright*, 430 U.S. 651 (1977) (school paddling), a point the *Parratt* Court expressly recognized and relied upon. *See Parratt*, 451 U.S. at 542 (court's post-deprivation remedy analysis asserted to be "quite consistent with the approach taken ... in *Ingraham*"). Accordingly, I accept that Virginia's ordinary tort remedies (irrespective of any special state Tort Claims Act remedies later provided) might supply the due process that would defeat a § 1983 claim such as Daniels's.

But I would hold that if under state law the defendant in this case could avoid liability on Daniels's state-law claim by the defense of sovereign immunity, the state's post-deprivation remedy does not provide for Daniels the adequate state remedy required to defeat his § 1983 claim on *Parratt/Ingraham* grounds. *See Parratt*, 451 U.S. at 551 n.9 (Powell, J., concurring).[3]

III

But this in turn, then leads to the difficult question of how, in this or any case, a federal § 1983 court is to determine whether an otherwise adequate post-deprivation state remedy is made inadequate because of the possible availability of a sovereign immunity, or other official immunity, defense to the generally cognizable state-law claim. Of course,

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[3] The state suggests that even if sovereign immunity is available to defeat a parallel state tort claim, this cannot be held to negate the adequacy of the state's post-deprivation remedy as due process, given the fact that the availability of a qualified immunity defense to § 1983 claims is not thought to raise any due process questions. There is an element of plausibility in this, but I think it could present a serious question only if the available state immunity defense were no broader than the qualified immunity defense under § 1983. There is no suggestion here of that, and the question can therefore be reserved for another day.

no problem would exist where state law on the point is clear, or is stipulated, or possibly where the defense though available is waived for a particular case. But that, regrettably, is not the case we have. Here, the availability and scope of the defense is by no means clear on the record before us.[4] And indeed, the problem is aggravated here by the fact that though the Commonwealth argues before us that the state remedy is not made inadequate by that means, we are told that in the parallel state action it has raised sovereign immunity as a defense.

In this situation, I believe that the only fair course for a federal § 1983 court—certainly the only fair one for the claimant—is to condition dismissal of the § 1983 action on the abandonment or waiver by the state of any sovereign immunity defense it might assert, or the entry of an authoritative judgment by the state court that the defense does not bar the claimant's state claim.

Accordingly, I would remand to the district court with instructions to dismiss on those conditions, leaving to claimant the right to reinstate his § 1983 claim upon the entry of any judgment in his state action holding his state claim barred by sovereign immunity.

Judge Winter and Judge Murnaghan authorize me to say that they join in this opinion. Judge Ervin authorizes me to say that he concurs in part I of this opinion.

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[4] The majority avoids specific decision on this issue by assuming that if the existence of a sovereign immunity defense could make a state's post-deprivation process inadequate for § 1983 purposes, no such defense would be available under state law to the defendant here, either because the duties in question were ministerial or because no sovereign immunity defense is available to a sheriff (or his deputy) as distinguished from other state officials. For reasons explained in Judge Winter's opinion in the companion cases, No. 82-6128, *Ausley* v. *Mitchell* and No. 82-6143, *Poole* v. *Morris*, and because of the state's litigation positions in this and the parallel state action, I do not believe that the assumption that no sovereign immunity defense will be available in the state action can—in fairness to claimant—be indulged by this court as the basis for dismissal.

ERVIN, *Circuit Judge*, concurring in part and dissenting in part:

I concur in Part II of the majority opinion and in the decision to affirm the judgment of the district court.

I am unable, however, to accept the rationale contained in Part I of the majority opinion, and I respectfully dissent therefrom, for the reasons cogently stated by Judge Phillips in part I of his dissenting opinion, in which I join.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-6128*

RICHARD A. AUSLEY, APPELLANT

v.

J. P. MITCHELL, WARDEN
VIRGINIA STATE PENITENTIARY,
RAY CHAVIS, RECREATIONAL DEPARTMENT, APPELLEES

No. 82-6143*

WILLIAM POOLE, III, APPELLANT

v.

EDWARD C. MORRIS,
SAMMUEL V. PRUETT,
GEORGE L. FURGESON, APPELLEES

APPEALS FROM THE EASTERN DISTRICT OF VIRGINIA, No. 82-6128 AT NORFOLK, RICHARD B. KELLAM, DISTRICT JUDGE; No. 82-6143 at Richmond, David G. Lowe, Magistrate. (82-36-N; CA 81-0152-R)

On Petition for Rehearing:

Argued: December 6, 1983 **Decided November 16, 1984**
(748 F.2d 224)

Before WINTER, *Chief Judge*, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, *Circuit Judges*, sitting en banc.

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* These cases were argued together with *Daniels* v. *Williams*, No. 82-6538.

Russell Williams, Third Year Law Student (Robert E. Shepherd, Jr., University of Richmond School of Law, Patricia L. Harrington, Third Year Law Student, on brief, Stephen Saltzburg, for Appellants; James W. Hopper, Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia, on brief) for Appellees.

WIDENER, *Circuit Judge:*

These two appeals were consolidated for argument from judgments in favor of defendants in actions under 42 U.S.C. § 1983. We affiarm.

Richard Ausley, while an inmate at the Virginia state penitentiary, was sent some art supplies by his family on November 18, 1980. The supplies were picked up by him from the prison package room. He was informed, however, that the art supplies could not be taken from the recreation building. As the art department claimed it did not have facilities to store the materials, Ausley was forced to leave them in the recreational day room, from which they disappeared. He sues for their value.

William Poole, III, when he arrived at the Mecklenburg Correction Center on August 6, 1979, was told that he could not keep some of his personal property. He requested that such property be sent to his sister, Lucille Whittaker. On August 14, 1979, Poole received a set of 47 books. He was informed that he could not keep the entire set, so, rather than break it up, he elected to send it to a certain Becky Shields. The property officer negligently sent to Miss Shields both the personal property intended for Poole's sister and also the books. Poole has not been able to obtain the return of his personal property and sues for its value.

There is no claim other than ordinary negligence asserted by either Ausley or Poole on account of the loss of their property, and its negligent loss states a § 1983 deprivation of property claim under *Parratt* v. *Taylor*, *infra*, unless with due process of law.[1]

These cases are covered by a straightforward application of *Parratt* v. *Taylor*, 451 U.S. 527 (1981); *Phelps* v.

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[1] Each of the courts below dismissed the complaints for the reason that Virginia law afforded a remedy for the property losses.

Anderson, 700 F.2d 147 (4th cir. 1983); *First Virginia Bank-Colonial* v. *Baker*, 225 Va. ___, 301 S.E. 2d 8 (1983); and that part of *Daniels* v. *Williams*, No. 82-6538 (4th Cir. 1984) (en banc), decided this date, which relates to this case.

The duties of the prison employees in both cases now before us were merely ministerial. The state employee in Ausley's case had no discretion but to use ordinary care to keep the art supplies for Ausley, and, in Poole's case, to send the property involved to Poole's sister. Thus, actions could have been brought in the Virginia courts for the value of the property lost. That being true, although Ausley and Poole were negligently deprived of their property, the deprivations were not without due process of law under *Parratt* v. *Taylor*.

A sufficient alternate reason for our decision is that the inmates had an administrative remedy by way of grievance. *Phelps* v. *Anderson*, *supra*.

The judgments are accordingly *AFFIRMED*.[2]

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[2] The separate opinion argues that the recent cases of *Bowers* v. *Com. Dept. of Highways & Transp.*, 302 S.E.2d 511 (Va. 1983), has introduced an uncertainty in the Virginia decisions respecting the immunity of state employees. It bases its reasoning principally on a quotation from *Bowers* that the distinction between discretionary acts (ordinarily immune) and ministerial acts (not ordinarily immune) is "but 'one of the indicia of entitlement to immunity,'" and describes the *Bowers* decision as a "recent development[. . .]." *Bowers* dealt with the act of a state employee which was admittedly discretionary.

While *Bowers* is a recent case, the rule is anything but in the context here. The quotation from *Bowers* seized upon is based upon *James* v. *Jane*, 282 S.E.2d 864 (Va. 1980).

In the sought-for time sequence, the reliance on *Bowers* is misplaced. *James* was in place and decided well before our opinion in *Phelps* v. *Anderson*, 700 F.2d 147 (4th cir. 1983). *Phelps* held that Virginia afforded an adequate remedy in court for the negligent deprivation of use of a prisoner's television set by prison employees, and it depended explicitly upon the reasoning of *James* as authority for its holdings, especially pages 50-55 of the Virginia Reports, Vol. 221. The employees' action complained of was a "simple ministerial act," 700 F.2d at 149, and the court did not read into *James* the doubt now expressed in the separate opinion. Indeed, we note that the quotation from *Bowers*, upon which the separate opinion relies, depends on page 53 of *James* in the Virginia Reports, squarely in the middle of those pages depended upon by this court in *Phelps*. It is apparent that *Phelps* simply does not construe *James* in the same manner as would the separate opinion, and as we do not construe either *James* or *Bowers*. We reiterate our confidence in the holding of *Phelps*. The very

Footnote 2—Continued:

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recent case of *Messina* v. *Burden*, No. 811485, ___Va.___ (Oct. 12, 1984), is in accord with our conclusion.

To repeat, in *Phelps* we construed Virginia law as imposing liability on a state employee for the negligent performance of a ministerial act. The acts complained of here are certainly ministerial. Even if Virginia law may not be "certain [. . .]," separate op. p. 3, as to the immunity of state employees for the negligent performance of discretionary acts, it is certain that state employees negligently performing ministerial acts are not entitled to immunity. See, e.g., *Lawhorne* v. *Harlan*, 214 Va. 405, 200 S.E.2d 569, 571-572 (19730.

Along the same line, we held in *Phelps* that Virginia's grievance procedure ". . . also provided an adequate post-deprivation remedy for Phelps." 700 F.2d at 149. While the Department of Corrections, Division Guidelines, for the grievance procedure have been changed since the occurrence which caused the *Phelps* case, the new Guidelines are not less favorable to prisoners. They have been approved by the U.S. Attorney General under 42 U.S.C. § 1997e. Since the prison grievance procedure is an adequate remedy, it affords sufficient due process to bear the claims. Thus, even were the separate opinion to be correct in its reasoning with respect to immunity, it also would be necessary to reject the holding of *Phelps* with respect to an adequate grievance procedure in order to arrive at the conclusion that it does, i.e., the dismissal of the claim should be conditional. No reason is apparent to us why there should be a conditional dismissal of the claim in the face of an adequate grievance procedure. *Phelps'* holding is to the contrary. See also *Hudson* v. *Palmer*, 52 L.W. 5052, 5057, n. 15 (U.S. 1984).

In this connection, footnote 2 of the minority opinion apparently takes the position that relief in any event is discretionary under the Virginia grievance procedure, although the grievance may admittedly have merit, and cites as support a statement made by the Assistant Attorney General at oral argument indicating that the scope of relief available is "a matter of discretion and not a matter of right." We think the minority errs in relying on only part of the colloquy concerning the discretion involved in the grievance procedure. When counsel stated that awards were "a matter of discretion," he was responding to various questions from the court regarding the adequacy of any remedy the discretion to award which was placed in the hands of a prison official who might be interested in or even be a defendant in the lawsuit. The discussion between the court and counsel dealt with the objectivity of such a hearing officer and whether or not discretion ought to be entrusted to such an officer to decide whether to give an award and the amount thereof. Taken in the entire context of the discussion, contrary to what the minority suggests, we think the attorney was not responding to whether the grievance procedure permitted arbitrary denials of awards otherwise authorized. In fact, counsel maintained

Footnote 2—Continued:

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that the grievance procedure was itself an adequate postdeprivation remedy despite the possible role of a prison official as hearing officer because of the presumption that an official will perform his duty in a lawful manner and the availability of an appeal from the initial determination through various levels in the penal system.

The discussion follows:

> Counsel: May it please the Court if I could just address the question of the availability of the state grievance procedure to Mr. Daniels. [As noted, Daniels' case was argued with these cases]. The grievance procedure which was recently certified by the United States Attorney General under the CRIP Act provides for possibility of monetary compensation for the loss of property. It has not been applied in a personal injury situation . . . The grievance procedure as currently certified is essentially the same grievance procedure that was in effect prior to certification. And, even prior to certification, some compensation had been awarded to inmates for property losses. I believe they had awarded amounts up to $125.
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> Court: There has been some suggestion that awards that are made are made in a way in which a court normally makes awards, on some independent objective factfinding determination. Here you have got one of the officials who may be one of the defendants in the lawsuit making the determination of how much money should be paid. That is hardly an adequate remedy in terms of objectivity and fairness.
>
> Counsel: Well, your Honor, I would submit that the grievance procedure has built into it various levels of appeals and it goes from the warden of the institution all the way up to the director . . .
>
> Court: But the basis on which awards are made is discretion, not a matter of right?
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> Counsel: I think that is a fair statement, your Honor, it is a matter of discretion and not a matter of right, based on all of the facts as they appear with some appeal process built into the system . . .
>
> Court: Well, I just find it hard to say it is adequate when it is a matter of the discretionary determination of the prison official who is either himself or herself a defendant or has close connections with a person who is named as a defendant . . .
>
> Counsel: Well, your Honor, I think we have to assume, and I think it is a correct assumption, that individuals are going to perform in a lawful manner. I think obviously this allegation that arises later that they didn't—a new cause of action has been stated and maybe that remedy is not adequate. But, until those facts are developed, or at least alleged, I think we must assume that prison officials will appropriately carry out their duties.

From this colloquy, it is apparent that counsel did not intend to suggest that the grievance procedure permitted arbitrary denials of otherwise au-

Footnote 2—Continued:

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thorized awards. To begin argument, counsel discussed the current guidelines for the grievance procedure which were recently certified by the United States Attorney General and commented that these guidelines were essentially the same as those in effect prior to certification. The current guidelines which were in effect at the time of oral argument establish available remedies and explicitly provide, *inter alia*:

> 4-14.5 . . . The grievance procedure shall afford a successful grievant a meaningful remedy . . . Remedies must include, but not be limited to, the following: (h) Loss of inmate property within the custody and control of the unit—return of property, replacement of property of equal value at time of loss, or monetary payment equal to value of property at time of loss.

Department of Corrections Commonwealth of Virginia, Inmate Grievance Procedures (Feb. 14, 1983) (superseding prior certified guidelines issued Oct. 12, 1982).

By comparison, the precertification guidelines in broader language provided ". . . inmates with an administrative method for the settlement of grievances they have relating to their confinement." They gave inmates "a regularly available channel for the expression of their grievances," and were to "foster prompt solutions." Authority to decide the same was specifically provided: "The Superintendent will have the necessary authority to resolve inmate complaints filed pursuant to this Guideline." An administrative appeal from the decision of the Superintendent was provided for. Department of Corrections Commonwealth of Virginia Inmate Grievance Procedure (March 31, 1977). Significantly, to repeat, we held in *Phelps* that the grievance procedure under the precertification guidelines provided an adequate postdeprivation remedy for an aggrieved inmate. 709 F.2d at 149.

Implicit in counsel's reference to the current, as well as the precertification guidelines, is the fact that any award to an aggrieved party is based on the discretion of the factfinder in considering the merits of the complaint. We think counsel in no way suggested that discretion could be exercised arbitrarily to deny otherwise valid claims. Clearly, the basis for the awards under both the current and precertification guidelines would be an exercise of discretion on the part of the fact-finder in addressing the merits of a complaint and, in this sense, awards would be a matter of discretion and not a matter of right. To the extent that the minority concludes from the statement of the attorney that awards are purely discretionary, thus implying that no adequate state remedy exists, it has failed to consider that, in addressing the issue of discretion involved in granting awards, the attorney obviously was responding that any award under the grievance procedure would be based on the discretion of the hearing officer in considering the merits of the complaint. This is no different than the way a federal district judge considers a case before him, or any other trial judge for that matter.

WINTER, *Chief Judge*, concurring in part:

In these two appeals, the principal question to my mind is whether Virginia affords a state-court state-law remedy for the property losses sustained by the two plaintiffs if they can prove their allegations of liability. Certainly *Parratt* v. *Taylor*, 451 U.S. 527 (1981), teaches that they have no cause of action under 42 U.S.C. § 1983 if they have a state remedy. To my mind also, the question of whether there is a state remedy depends upon a determination of whether Virginia would recognize the defense of sovereign immunity if the defense is pleaded in a state tort action in a state court.[1] The very recent decision in *Hudson* v. *Palmer*, ___ U.S. ___, ___, 52 U.S.L.W. 5052, 5057 (July 3, 1984) strongly suggests that if sovereign immunity is available as a defense, the requirements of *Parratt* to oust § 1983 jurisdiction would not be met.

The majority opinion concludes that Virginia would not recognize sovereign immunity as a defense were these actions pending in a state, and I am inclined to agree. In *Palmer* itself, the Court accepted the correctness of our statement that Palmer's claim for intentional destruction of his noncontraband property would not be barred by sovereign immunity if he asserted it in an action in a state court. We have also held in *Phelps* v. *Anderson and Langford*, 700 F.2d 147, 149 (4 Cir. 1983), that an inmate's claim for wrongful deprivation of his television receiver, asserted against two prison officials who confiscated it improperly and failed to return it after he proved ownership, would not be barred by sovereign immunity.[2] Both in the majority opinion and in

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[1] The record does not disclose if either plaintiff has instituted any action in a state court. In a companion case, consolidated for argument with these two appeals—No. 82-6538, Daniels v. Williams—plaintiff sued both in state and federal courts for personal injuries. In the state court action, defendant pleaded sovereign immunity while before us he contends that the defense is not available. Counsel for the defendants in his brief in these two cases argues that sovereign immunity will not be held to bar a state-court suit. Nevertheless, in oral argument he admits that he would advance a sovereign immunity defense in state court. Counsel's candor does not dispel the uncommendable inconsistency in his approach.

[2] As an alternative holding, *Phelps* said that the then Virginia grievance procedure provided a postdeprivation remedy to preclude Phelps'

Phelps, we have deemed the touchstone of whether sovereign immunity may be successfully pleaded to be a factual determination of whether the state employee was performing a discretionary or ministerial act when he gave rise to liability. If discretionary, he is immunized from liability by sovereign immunity, if ministerial, sovereign immunity is not available as a defense to personal liability.

The state precedents cited and discussed in the majority opinion and in *Phelps* certainly appear to stand for the proposition for which they are cited. There is, however, a later state decision, not mentioned by the majority, which I think at least raises the specter that we may not have correctly discerned the state of Virginia law. The case is *Bowers* v. *Commonwealth of Virginia, Dept. of Highways & Transp.*, ___ Va.___, 302 S.E.2d 511 (1983). That case held that the resident engineer of the highway department was entitled to assert sovereign immunity for his alleged negligence in the construction of a concrete culvert incident to improvement of a state highway. The unsettling aspect of the case is that it appears to scuttle the bright line test that sovereign immunity applies to discretionary acts but is not applicable to min-

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§ 1983 claim for damages for temporary deprivation of the use of his television set. *Phelps* was decided after the decisions of the district court in the instant cases but well before they were reargued in banc.

Phelps was not cited by the Commonwealth as a supplementary authority; and when the court inquired of counsel for the Commonwealth about the scope of relief available under Virginia's grievance procedure, we were told that awards are "a matter of discretion and not a matter of right." We were also told by counsel for plaintiffs that they had unsuccessfully sought redress for their claims under the Virginia grievance procedure. I would therefore decline to reach the issue of the effect of the Virginia grievance procedure on plaintiffs' right to maintain their actions in the district court.

But even if the Virginia grievance procedure is to be considered, I think that, like the defense of sovereign immunity discussed in the text, the record is not sufficiently complete to hold unconditionally that the grievance procedures provide a postdeprivation remedy in these cases sufficient to foreclose plaintiffs' claims under *Parratt*. In my view, it is incumbent on the Commonwealth to offer proof demonstrating the availability and the complete efficacy of any postdeprivation remedy relied on to invoke the rule of *Parratt*. Short of such a showing, any dismissal of plaintiffs' complaints should be a conditional one.

isterial acts. Instead it is but "one of the indicia of entitlement to immunity." 302 S.E.2d at 515. In this regard, as the dissenters in *Bowers* point out, that decision gives new life to the conflict between two apparently divergent lines of Virginia authority with regard to the availability of sovereign immunity as a defense in a suit against a state employee for his alleged negligence. 302 S.E.2d at 516.

In short, recent developments have rendered the applicable Virginia law difficult if not impossible to predict with certainty.[3] Unfortunately, Virginia is a state that has no mechanism whereby we can certify the question and obtain an authoritative answer. I am persuaded by some of our past unsuccessful efforts to give authoritative and correct answers as to state law that we ought not overlook the possibility that once again we may not have made a correct prediction. We ought to afford plaintiffs some protection from an erroneous determination on our part.

While I would therefore affirm the judgments of the district court, I would require the district court to grant, as a condition of dismissal, leave to plaintiffs to reinstate their cases in the event that sovereign immunity is upheld as a defense to the prosecution in a Virginia court of any claim now pending or hereafter filed arising out of the facts and matters alleged in their complaints under § 1983.[4]

Judge Phillips and Judge Murnaghan authorize me to say that they concur in this opinion.

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[3] We had occasion to express this conclusion in *Fox* v. *Curtis*, 712 F.2d 84, 89 (4 Cir. 1983). Further evidence of the expansion and confusion of Virginia's sovereign immunity defense is the Supreme Court of Virginia's recent decision in *Hinchey* v. *Ogden*, ___ Va. ___, 307 S.E. 891 (1983). In *Hinchey*, the court extended the doctrine to cover, not only actions at law for damages but also, suits in equity to compel or restrain action by government. *Id.* at 894.

[4] This is essentially the course of action recommended in a thoughtful article, *see* K. Blum, The Implications of *Parratt* v. *Taylor* for Section 1983 Litigation, 16 The Urban Lawyer 363, 380-81 (1984).